TAULANI SDN. BHD., RE: EX P;
THE OFFICIAL RECEIVER & LIQUIDATOR & ANOR.

HIGH COURT BORNEO, KOTA KINABALU
SYED AHMAD IDID JC
[COMPANIES WINDING-UP NO. 4 OF 1978]
23 JULY 1991

COMPANY LAW: *Winding-up order - Intervener - Whether a party - Creditors - Only entitled to distrubution of assets by dividend - Companies Act 1965, ss. 237(3), 244(1) - Companies (winding-up) Rules 1972, r. 65.*

CIVIL PROCEDURE: *Application for joinder - Creditor - Locus standi - Rules of High Court 1980, O. 15 rr. 6(2)(i), (ii), O. 94 r. 4.*

Pursuant to s. 237(3) of the Companies Act 1965, the Official Receiver and Liquidator was granted an order to dispose of the company's property, convene a creditor's meeting and distribute the sale proceeds as expeditiously as practicable. Pursuant to such order the Official Receiver had made several attempts to sell a piece of land owned by the Company together with a 5 storey building situate thereon. Subsequently in April 1991 the Official Receiver had entered into an agreement with a prospective purchaser, S, to sell the property to S for RM940,000. The agreement was subject to approval of the Court.

The intervener, G, filed an application to be joined as a party to the Official Receiver and Liquidator's application under O. 15 r. 6(2)(i) & (ii) and O. 92 r. 4 of the Rules of the High Court 1980 claiming that G should be joined as a party to the action as a creditor and objecting to the price at which the property was to be sold. G had made an earlier offer to purchase the property for RM913,000 and on 29 June 1991 (offer received by the Official Receiver on 4 July 1991) while this matter was in Court G made an offer to purchase the property for RM960,000. The mode of payment was to be partly by way of set-off against G's claim against the Company.

Held:

[1] The intervener's rights are already adequately protected by the Official Receiver and Liquidator.

[2] There is no direct involvement by the intervener in this action as he is merely one of the creditors and that he was only attempting to offer to buy the property while the matter was pending in Court.

[3] The Official Receiver and Liquidator had not acted unreasonably in supporting the agreement which he had made in good faith with the purchaser.

[Application dismissed.]

Cases referred to:

Gurtner v. Circuit [1968] 1 All ER 328 ***(dist)***

Arab Malaysian Merchant Bank Bhd. v. Dr. A. Jamaludin bin Dato' Mohd. Jarjis [1991] 1 CLJ (Rep) 19 ***(dist)***

In Re The Estate of Tunku Mohamed Jewa Ibni Almarhum Sultan Abdul Hamid (deceased), Tunku Ismail Tunku Mohamed Jewa & Anor. v. Tunku Baharom bin Tunku Mohamed Jewa & Ors. [1982] 2 MLJ 44 ***(dist)***

Che Ahmad [1941] MLJ Rep 105 ***(dist)***

Haji Said v. Haji Ahmad & Anor. [1957] MLJ 50 ***(cit)***

Re - Chee Kean Kor [1957] 23 MLJ 34 ***(cit)***
Leon v. York-O-Matic Ltd. & Ors. [1966] 3 All ER 277 ***(cit)***
Re - A Debtor (No. 400 of 1940) Ex Parte The Debtor v. Dodwell [1949] 1 All ER 510 ***(cit)***

Legislation referred to:
Companies Act 1965, ss. 236(2), 237(3), 244(1)
Companies (Winding-up) Rules 1972, r. 65

For official receiver - Lee Yee Kuang
For intervener - Joseph Ambrose Lee

For creditors
Perkasa Trading Sdn. Bhd. - C Robertson and James Patrick
Chung Khiaw Bank Ltd - Richard Malanjum
Seng Huat Sawmill - Nancy Tan
Inland Revenue Department - Mabel Wee

JUDGMENT

Syed Ahmad Idid JC:

On 8 June 1991, the Official Receiver and Liquidator filed an *exparte* summons-in-chambers under s. 237(3) of the Companies Act 1965, for direction that:

> ...the Official Receiver and Liquidator may be at liberty to sell the property of the company described as TL. 017506571, together with a five (5) storey building erected thereon known as Lot 11, Jalan Perpaduan, Kampung Air, 88000 Kota Kinabalu, Sabah, to Sazone Development Sdn. Bhd. for the sum of RM940,000 and that the conditional agreement dated 20 April 1991 made between the parties concerned may be sanctioned and carried into effect.

It must be stated here that the Official Receiver had actually filed in the summons-in-chambers for direction with a certificate of urgency way back on 24 April 1991. But the Court Registry had lost the file. There was then a period spent in reconstructing the documents. It was only in June that the reconstruction of the file pertaining to this action and the winding-up was complete.

Then on 14 June 1991, Haji Ghazali bin Datuk Haji Taulani (as administrator of the estate of Allahyarham Datin Hajjah Nafsiah bte Datuk Haji Mustapha) ("proposed intervener") filed a summons-in-chambers under O. 15 r. 6(2)(b)(i) and (ii) and O. 92 r. 4 of the Rules of High Court 1980, and applied for the following orders:

(1) that leave be granted to him so that he can be joined as a party to the Applicant's application pursuant to O. 15 r. 6(2)(b)(i) or (ii) of the Rules of the High Court, 1980;

(2) that the application for direction be stayed pending the outcome of his application to be joined as a party to the Applicant's application for an order for sale and sanction to carry into effect the conditional agreement entered between the applicant and Sazone Development Sdn. Bhd;

(3) that abridgement of time be allowed to serve the Intervener's application on the Applicant; and

(4) such further or other relief as this Honourable Court may deem fit.

A winding-up order had been made against Taulani Sdn. Bhd. ("the company") by the Court on 26 June 1981 (ten years ago) and the Official Receiver Malaysia was appointed the Liquidator.

The company is the registered owner of land TL. 017506571 with a 5 storey building thereon (which is the subject of these actions) hereinafter referred to as "the said property". The said property was the subject of litigation in Kota Kinabalu High Court Originating Summons No. K.129 of 1981 which was concluded on 6 August 1984. The Official Receiver and Liquidator was then free to deal with it in the winding-up.

According to Mr. J Mahinder Singh, the Senior Assistant Official Receiver, the Liquidator has a duty to cause the assets of the company to be collected and applied in the discharge of its liabilities. See s. 244(1) of the Companies Act 1965 read with r. 65 of the Companies (Winding-up) Rules 1972.

The Official Receiver made several attempts to realise the said property. The reserve price of the property was reduced from RM1.65 million in 1984 to RM1.3 million in 1985 to RM1.1 million in 1986. They appointed an estate agent, M/s. C H Williams Talhar & Wong (Sabah) Sdn. Bhd. on 19 March 1985. A prospective buyer offered RM980,000 in 1989 but withdrew. On 15 December 1990, another estate agent SPK Estate Agents informed the Official Receiver and Liquidator of an offer at RM900,000 which after negotiations increased to RM940,000. A conditional agreement had been entered into between the company acting by the Official Receiver and Liquidator as vendor and Sazone Development Sdn. Bhd. as purchaser on 20 April 1991. A copy of the sale and purchase agreement was tendered as "JMS-1". The agreement is subject to and conditional upon the approval of the Court. The property had been valued by the Jabatan Penilaian dan Perkhidmatan Harta Negeri Sabah at RM900,000. A copy of the valuation report dated 11 December 1990 was tendered and marked "JMS-2". In the opinion of the Official Receiver and Liquidator, it would be expedient to accept this offer without needlessly protracting the winding-up proceedings.

The sale and purchase agreement between the company and the Sazone Development Sdn. Bhd. had been prepared by M/s. Lee & Associates. The Official Receiver had also supplied a copy of the Laporan Ringkas on the said property prepared by the Timbalan Pengarah Penilaian dan Perkhidmatan Harta Negeri Sabah which put the market value at RM900,000.00 as at 26 October 1990.

Intervener's Application:

At the hearing on 16 July 1991, learned Counsel for the proposed intervener, Mr. Joseph Ambrose Lee, referred to the summons-in-chambers dated 14 June 1991 and the affidavits of Haji Ghazali bin Datuk Haji Taulani (undated), his further affidavit in support dated 10 July 1991 and J Mohinder Singh's affidavits dated 24 April 1991 and another dated 12 July 1991.

He cited the grounds on which he had based his application to intervene, that is, the Companies Act spells out rights of the creditor.

As to *locus standi*, he mentioned two cases (i) *Gurtner v. Circuit* [1968] 1 All ER 328, and (ii) *Arab Malaysian Merchant Bank Bhd. v. Dr. A. Jamaludin bin Dato' Mohd. Jarjis* [1991] 1 CLJ (Rep) 19 and cited the latter which held at (2) at p. 19 that:

> As a result of *Gurtner v. Circuit*, a person who is not a party is allowed to intervene if the intervener is directly affected not only in his legal rights (as provided for under O. 15 r. 6, Rules of the High Court 1980) but in his pocket.

One can observe that in the two cases above, the parties added to the action were directly involved. In *Gurtner*, it was the Motor Insurers Bureau, while in *Arab Malaysian Merchant Bank's* case, it was Jamalludin as a guarantor. Here I cannot see the direct involvement of

the proposed intervener though I accept he is merely one of the creditors albeit with proof of debt of more than 10%.

Among the several matters which Mr. Lee raised in Court were:

(i) The Official Receiver did not respond to the proposed intervener's several letters;

(ii) From 27 January 1982 to 25 June 1988, the Official Receiver did not file anything. This was borne out by the letter from En. Jaimi Idris, the Registrar of Companies, Cawangan Sabah, dated 16 July 1991;

(iii) The Official Receiver filed on 3 May 1991 Statements of Receipts and Payments from June 1988 to December 1990 but these were, so claimed Mr Lee, through the proposed intervener's persistency in asking for details;

(iv) The proposed intervener met the Official Receiver several times and the Official Receiver confirmed the assets at Exhibit HG-1 dated 1 November 1988;

(v) That it was a mandatory duty for the Liquidator to examine every proof of debt and the Official Receiver and Liquidator had not done anything but want to sell the assets. Mr. Lee objected to the sale despite s. 236(2) of the Companies Act. He would not object if the price is more than RM980,000;

(vi) The last offer (HA-11) by the proposed intervener on 16 May 1990 was at RM913,000 but the proposed sale now by the Official Receiver is at RM940,000.

(vii) From HG-1 (exhibited with the affidavit of the proposed intervener dated 10 July 1991). the Minutes dated 14 July 1989 showed that the proposed intervener was present then.

Legal contentions:

Mr Joseph Ambrose Lee referred to the case of *In Re - The Estate of Tunku Mohamed Jewa Ibni Almarhum Sultan Abdul Hamid (deceased), Tunku Ismail bin Tunku Mohamed Jewa & Anor. v. Tunku Baharom bin Tunku Mohamed Jewa & Ors.* [1982] 2 MLJ 44 where Syed Agil Barakbah J (as he then was) said at p. 45:

> The accepted principles adopted by the Courts in cases where administrators apply for leave to sell, having executed a conditional contract subject to the leave of the Court with purchasers and a beneficiary objecting to the contract thereof produces a higher offer is a *prima facie* duty to see that the estate benefits as much as possible.

The Court of Appeal in *Che Ah and Che Yang Kalsom v. Che Ahmad* [1941] MLJ Rep.105 held:

> It is not for the Court to consider the interests of the purchaser who is well aware of the risks he runs in entering into a conditional contract. The duty of the Court is to protect the rights of those interested in the property and it is immaterial that at the time the offer was made the price was a reasonable one...

There are two obvious differences in that our instant case:

(i) involves a creditor whereas in the *Re - The Estate Of Tunku Mohamed Jewa's* it was a beneficiary who objected. All creditors are only entitled to a distribution of the assets by way of a dividend and any surplus shall be returned to the contributories. It should be noted that both the contributories of Taulani Sdn. Bhd., Datuk Taulani bin Haji Jalaluddin and Musa bin Datuk Taulani had been adjudged bankrupts and their shares vest in the Official Assignee.

(ii) The beneficiary in *Tunku ewa's* had offered to buy the property at a price which was higher than that agreed to by the administrators and the offer by the beneficiary was made well before the conditional contract. In our case, the proposed intervener was only attempting to offer. The offer of RM960,000.00 was dated 29 June 1991, while this matter was pending in Court. The Official Receiver and Liquidator opined that the offer was not made in good faith as the intervener was aware that the Official Receiver and Liquidator was negotiating for the sale since January 1991. It was unfortunate that the proposed intervener had not indicated that he was prepared to make such a cash offer until now. The offer was received at the Official Receiver Liquidator's office only on 4 July 1991.

(iii) The decision in *Re - Estate Of Tunku Mohamed Jewa's* is therefore distinguished on the facts. It is commonsense that offers after a contract has been concluded may be mere efforts to force the purchaser to pay more, or if not that, it frequently happens that a person will be willing to offer more when someone else has committed himself when he would not have made any offer otherwise.

Haji Said v. Haji Ahmad & Anor. [1957] MLJ 50 held that an administrator can enter into an agreement for the sale of immovable property but the agreement is unenforceable unless the permission of the Court is obtained. In compliance with the law, the applicant applied to Court for directions and cited the following cases in support:

(i) *Re - Chew Kean Kor* [1957] 23 MLJ 34 - where Spenser Wilkinson J said:

> ... the Court will not interfere with the discretion of the Official Assignee even at the instance of the creditor unless his actions are so utterly unreasonable and absurd that no reasonable man would so act.

(ii) *Leon v. York-O-Matic Ltd. & Ors.* [1966] 3 All ER 277.

(iii) *Re - A Debtor (No: 400 of 1940) Ex parte The Debtor v. Dodwell* [1949] 1 All ER 510.

Meeting and Considerations of Offers:

While the Official Receiver and Liquidator was considering the other offers, the Intervener through his solicitors, M/s. Lee & Co. continued to harass the Official Receiver and Liquidator to hold a creditor's meeting to consider his offer to purchase the said property. Mr Mahinder Singh, after considering the circumstances of the matter, felt that there was no justification in holding a creditors' meeting to consider his offers. This was made clear to the Intervener's solicitor who had called at the Official Receiver and Liquidator's office on numerous occasions and a formal reply was also given on 15 May 1990 (refer to Exhibit HG-10 of the first affidavit).

The intervener submitted an offer to purchase the property at RM844,363.21 on 4 August 1989. This was revised to RM980,000.00 on 13 October 1989 and finally on 16 May 1990 the offer was made at RM913,481.76. See Exhibits HG-5, HG-8 and HG-11 of the intervener's first affidavit.

The mode of payment was identical in all three offers, that is part of purchase price was to be settled by way of a set-off against the purported claim of the late Datin Nafsiah bte Datuk Haji Mustapha. Her claim was stated to be RM730,881.21 when the offer for RM980,000.00 was made and RM584,363.21 when the offers for RM844,363.21 and RM913,481.76 were made. According to J Mahinder Singh, such an arrangement (as to mode of payment) was not acceptable as it would operate against the policy of winding-up provisions.

In view of the fact that the sale of the said property has protracted for too long, the Official Receiver and Liquidator exercised his discretion to negotiate the sale at a fair price and sought the Court's approval to the sale.

Other Creditors Present in Court:

At the hearing, other creditors were represented by (i) Mr. C Robertson and Mr James Patrick for Perkasa Trading Sdn. Bhd; (ii) Mr. Richard Malanjum for Chung Khiaw Bank Ltd.; (iii) Miss. Nancy Tan for Seng Huat Sawmill; (iv) Miss. Mabel Wee for Inland Revenue. None of them applied to be added as party or to intervene. They had been attending the general meetings held by the Official Receiver on 13 occasions since 1984 on:

21 November 1984;	20 December 1984;	16 October 1985;	13 June 1986
27 June 1986;	11 December 1987;	30 April 1988;	14 May 1988
14 July 1988;	06 August 1988;	10 September 1988;	17 October 1988
14 April 1989			

Dismissal of Proposed Intervener's Application:

I dismiss the intervener's application for an under O. 15 r. 6(2)(b)(i) and (ii) as I consider that his rights are already adequately protected by the Official Receiver and Liquidator and for the other reasons and legal principles discussed above.

The proposed intervener in his affidavit dated 14 June 1991 at para. 7, prayed for certain conditions to be attached to the sale in case the Court gives the sanction as applied for by the Official Receiver and Liquidator. I consider some of the conditions reasonable and I shall therefore include them with certain adaptations to suit the situation.

Official Receiver and Liquidators's Application Granted:

I grant the order-in-terms of the application for direction by the Official Receiver and Liquidator dated 8 June 1991 and additionally order that the Official Receiver and Liquidator convene a creditors' meeting within a reasonable time to brief all creditors attending regarding the sale and the status of income and expenditure, and I further order the sale proceeds be distributed as expeditiously as practicable.

As the Official Receiver and Liquidator has not acted unreasonably in supporting the agreement which he made in good faith with the prospective purchaser, the cost of both parties should be treated as between solicitor and client and that of the Official Receiver and Liquidator be paid out of the company assets.

Also found at [1991] 3 CLJ 2594